

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

TEXTRON INNOVATIONS INC.,
Plaintiff,

v.

**SZ DJI TECHNOLOGY CO., LTD., DJI
EUROPE B.V., SHENZHEN DAJIANG
BAIWANG TECHNOLOGY CO. LTD.,
AND IFLIGHT TECHNOLOGY
COMPANY LTD.,**
Defendants.

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W-21-CV-00740-ADA

**REPORT AND RECOMMENDATIONS OF
THE UNITED STATES MAGISTRATE JUDGE**

**TO: THE HONORABLE ALAN D ALBRIGHT,
UNITED STATES DISTRICT JUDGE**

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. Before the Court are the various pretrial motions listed in the table below. The Court heard oral argument on these motions on March 27, 2023. For the reasoning stated on the record during the hearing, the Court issued the following recommendations, which are memorialized below.

I. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. Parties filing objections must specifically identify those findings or recommendations to which they object. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to

the proposed findings and recommendations contained in this Report within fourteen (14) days shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report. See 28 U.S.C. § 636(b)(1)(C); *Thomas v Arn*, 474 U.S. 140, 150–53 (1985); *Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). Except upon grounds of plain error, failing to object shall further bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. See 28 U.S.C. § 636(b)(1)(C); *Thomas*, 474 U.S. at 150–53; *Douglass*, 79 F.3d at 1415.

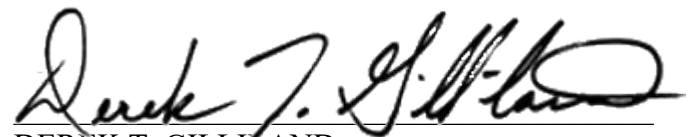
II. THE COURT’S RECOMMENDATIONS

Movant	Motion	Docket No.	Recommendation
Defendants	Defendants’ Motion to Exclude Opinions and Testimony of Plaintiff’s Expert Jeffrey Andrien	152	<p>DENIED with respect to Defendants’ position as a Chinese company, as this is more appropriate for a motion <i>in limine</i>.</p> <p>DENIED as to incremental profits, as the calculations are based on the unchallenged testimony of the technical expert, among other evidence.</p> <p>DENIED as to survey use, as it was based on Plaintiff’s historical use of a 25% rule.</p> <p>DENIED as to the failure to include a manufacturer, as this is more appropriate for cross-examination.</p>
Plaintiff	Plaintiff’s Motion for Leave to Serve Supplemental Opening Expert Reports	137	GRANTED. Defendants are permitted to submit a rebuttal report of equal length within seven days of the March 28, 2023. The parties are to meet and confer on whether a deposition is needed.
Defendants	Defendants’ Motion to Strike Plaintiff’s Belated Document Production and its New Theory and Evidence in its	216	GRANTED as to Plaintiff’s pierce-the-veil theory as there were no factual allegations sufficient to put Defendants on notice of the theory.

	Opposition to Defendant's Motion for Partial SJ		DENIED as to the USPTO filings as those are filings made by Defendants and Plaintiff had an excuse for the late production.
Defendants	Defendants' Motion for Partial Summary Judgment	151	<p>DENIED as to direct infringement. Plaintiff's evidence of website operation and the purchase agreement raises a fact question about whether Defendants directly infringed by offering to sell the Accused Products.</p> <p>GRANTED as to the piercing-the-veil theory for the reasons described in the Court's recommendation on ECF No. 216.</p> <p>GRANTED as to pre-suit induced and willful infringement. While there is adequate evidence that Defendants knew of the '909, '359 and '752 patents, there is insufficient evidence that Defendants knew they infringed.</p>
Defendants	Defendants' Motion for Leave to Amend their Answer to Add Defense of Unenforceability Due to Inequitable Conduct	110	GRANTED. The evidence was not produced until after the inventor's deposition, so there is sufficient excuse for the delay. Further, the parties briefed the issue, which alleviates any prejudice.
Plaintiff	Plaintiff's Motion for Summary Judgment of No Inequitable Conduct	144	DENIED. A fact question about inequitable conduct exists because of the late production of the documents, the discrepancy between the inventor's description of the documents and the actual documents, the inventor's description of using the documents to determine implementation of his invention, and the modifications to the '752 patent during prosecution.
Plaintiff	Plaintiff's Motion to Strike Testimony and Expert Opinions of Non-Infringing Alternatives	148	DENIED.
Plaintiff	Plaintiff's Motion to Exclude the Testimony of Mr. Todd Schoettelkotte	141	<p>GRANTED with regard to reliance on the settlement agreements under Rule 702 as unreliable and Rule 403 as misleading, as the license agreements did not involve the same parties or any of the patents-in-suit.</p> <p>DENIED in all other respects as any adjustments made under <i>Georgia-Pacific</i> and conversations</p>

			with Mr. Ai regarding availability go to the weight, rather than admissibility, of the opinion.
Plaintiff	Plaintiff's Motion to Exclude Certain Testimony and Expert Opinions of DJI's Non-Infringement and Invalidity Expert Dr. Illah Nourbakhsh	145	<p>DENIED as to Dr. Nourbakhsh's explanation of plain and ordinary meaning, provided he does not contradict or try to limit the Court's construction.</p> <p>DENIED as to Dr. Nourbakhsh's invalidity opinions that refer to Plaintiff's interpretation of the claims, since he anchors those opinions with how the prior art applies to the claim element.</p> <p>GRANTED as to Dr. Nourbakhsh's references to undisclosed prior art in ¶¶ 237, 295 of his Non-Infringement Report.</p>
Plaintiff	Plaintiff's Motion for Summary Judgment that the Asserted Claims of the '909, '085, and '752 Patents are Patent Eligible under § 101	146	GRANTED. The asserted claims are not directed to an abstract idea.
Plaintiff	Plaintiff's Motion for Summary Judgment of IPR Estoppel	150	DENIED. 35 U.S.C. § 315(e)(2) refers solely to patents and printed publications. This is also in accordance with caselaw from this Circuit.

SIGNED this 29th day of March, 2023.



DEREK T. GILLILAND
UNITED STATES MAGISTRATE JUDGE